RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 11 2013
OFFICE OF THE CLERK

No. 13-356

In the

Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORP., et al.,
Petitioners,

v.

SEBELIUS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICUS CURIAE BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

EDWIN MEESE III
214 Massachusetts Ave.. NE
Washington. D.C. 20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law at Chapman University
One University Drive
Orange, CA 92866
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae Center for Constitutional Jurisprudence

Library of Congress

QUESTIONS PRESENTED

Do individuals and families lose their First Amendment rights to religious liberty by running a business?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

REASONS TO GRANT REVIEW 3

I. Denial of Religious Liberty to Corporations and Family-Run Businesses Will Have a Significant Impact 3

II. Religion, As Understood By The Founders And This Court's Decisions, Is A Communal Activity Affecting The Way Citizens Conduct Their Lives 8

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Bob Jones Univ. v. United States,
461 U.S. 574 (1983).....8

Boy Scouts of America v. Dale,
530 U.S. 640 (2000).....1

Bradfield v. Roberts,
175 U.S. 291 (1899).....8

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993).....8

Citizens United v. Federal Election Comm'n,
558 U.S. 310 (2012).....9

City of Chicago v. Morales,
527 U.S. 41 (1999).....14

Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos,
483 U.S. 327 (1987).....8

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004).....1

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978).....8, 9

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,
132 S. Ct. 694 (2012).....8, 15

In re Bryan's Case,
1 Cranch C.C. 151; 4 F. Cas. 506 (D.C. Cir. 1804)11

In re Williams,
29 F. Cas. 1334 (E.D. Penn. 1839) 11

Marsh v. Chambers,
463 U.S. 783 (1983) 10

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 9

Reason v. Bridges,
1 Cranch C.C. 477; 20 F. Cas. 370
(D.C. Cir. 1807) 11

Roberts v. Jaycees,
458 U.S. 609 (1984) 9

Solid Waste Agency of Northern Cook County v. Army Corps of Engineers,
531 U.S. 159 (2001) 16

United States v. Kennedy,
26 F. Cas. 761 (D. Ill. 1843) 11

Van Orden v. Perry,
545 U.S. 677 (2005) 1

Whitman v. American Trucking Associations,
531 U.S. 457 (2001) 16

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) 1

Zorach v. Clauson,
343 U.S. 306 (1952) 10

Statutes

42 U.S.C. § 300gg–13(a)(4) 15

Other Authorities

Allen, W.B., GEORGE WASHINGTON, A COLLECTION
(Liberty Classics 1988) 10

http://corporate.interstatebatteries.com/mission/ 7

http://harvesthousepublishers.com/history/ 4

http://news.harvard.edu/gazette/story/2009/11/god-and-walmart/ 3

http://servicemaster.com/about-us/history 7

http://thefellowshipfoundation.org/activities.html .. 13

http://www.atlantarotary.org/2012-atlanta-interfaith-business-prayer-breakfast 13

http://www.becketfund.org/hhsinformationcentral/ ... 3

http://www.businessinsider.com/17-big-companies-that-are-intensely-religious-2012-1?op=1 7

http://www.chick-fila.com/Pressroom/Fact-Sheets/sunday_2012 6

http://www.ecpa.org/?page=about_ecpa 5

http://www.hobbylobby.com/our_company/ 4

http://www.kregel.com/ME2/dirmod.asp?sid=A12DB34B70
B34EA28EA748A96CD5AEFE&type=gen&mod=Core+Pages&gid=A615A3BFB3EA496C83F0F4CFDCBE387D 5

http://www.legatus.org/mission 13

http://www.lifeway.com/Article/About-Us 6

http://www.paulistpress.com/Promotions/About-Us.aspx 5

http://www.thehighcalling.org/about 12

http://www.washingtonpost.com/blogs/on-leadership/wp/2013/08/19/forever-21s-leaked-memo-faith-at-work/ 4

http://www.whitehouse.gov/the-press-office/2013/02/07/remarks-president-national-prayer-breakfast 13

http://www.wycliffe.org/About/WhatWeBelieve.aspx 4

Story, Joseph, COMMENTARIES ON THE CONSTITUTION (Little, Brown & Co. 1858) 2

The Center for Consumer Information and Insurance Oversight, *Annual Limits Policy: Protecting Consumers, Maintaining Options, and Building a Bridge to 2014*, Available at http://www.cms.gov/CCIIO/Resources/Files/approved_applications_for_waiver.html.....14

THE FOUNDERS' CONSTITUTION (Kurland, Phillip B. and Lerner, Ralph, eds. 1987).....11

THE NEW OXFORD STUDY BIBLE at (Coogan, Michael D., ed.) (Oxford 2007).....2, 10

Thorpe, Francis Newton, THE FEDERAL AND STATE CONSTITUTIONS (Hein 1993) 12

Warren, Mercy Otis, HISTORY OF THE RISE, PROGRESS, AND TERMINATION OF THE AMERICAN REVOLUTION (1808) (Liberty Fund 1988) 10

Rules

Sup. Ct. R. 37.32(a) 1

Sup. Ct. R. 37.6.....1

Regulations

77 Fed.Reg. 8725, 8725 (Feb. 15, 2012).....15

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the Founders intended to protect religious liberties of all citizens and to encourage participation in religious activities as a civic virtue. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The Center is vitally interested in preserving the freedom of religion as one of the central liberties protected by the Constitution. The First Amendment prohibits interference with the free exercise of religion, and does not distinguish between individuals acting alone or associating in groups. Nor does the

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief and those consents have been lodged with the Clerk. All parties were given notice of this brief more than 10 days prior to filing.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

liberty recognized in the First Amendment limit the exercise of religion to churches and other houses of worship. The Founders understood that "religion" extended beyond mere private belief to encompass how citizens conducted themselves in every aspect of their daily lives.

SUMMARY OF ARGUMENT

The decision below and the argument of the United States evince a fundamental misunderstanding of religion. The Christian[2] religion, as understood by the Founders and as practiced today, is both communal and a way of life for the individual. It should come as no surprise then that thousands of businesses across the country will be affected by a ruling that strips religious freedom from family-owned businesses and other small corporations. Whether family-owned or driven by the vision of the founder, many businesses today exercise the faith of their owners in the way they pursue commerce.

The Christian religion is also communal. It requires gatherings both in worship and in everyday action. This is because religion extends well-beyond a weekly worship service. Instead, religion informs our every action, both in business and private interactions.

---

[2] Amicus focuses on the Christian religion since that was the belief system shared by the Founders. *See* Joseph Story, 2 COMMENTARIES ON THE CONSTITUTION §§ 1874-77 (Little, Brown & Co. 1858). Other religions, however, are similarly communal in practice and establish rules for a way of life. *See, e.g.*, Leviticus, THE NEW OXFORD STUDY BIBLE at Hebrew Bible 142 (Michael D. Coogan, ed.) (Oxford 2007).

REASONS TO GRANT REVIEW

I. Denial of Religious Liberty to Corporations and Family-Run Businesses Will Have a Significant Impact

This case is not just about the family that runs Conestoga Wood Specialties. The Becket Fund has documented 74 separate challenges to the so-called contraceptive mandate filed by more than 200 different plaintiffs including 39 for-profit business entities.[3] But these are only the businesses and groups that have been able to step forward to date. Thousands of others individuals and families operate their businesses based on their faith. A ruling that business owners forfeit their religious liberty when they enter the marketplace will have a significant, nationwide impact.

One of the largest retail chains in the world, Wal-Mart, was started by Sam Walton who "worked into the company's corporate structure the notion of 'service leadership' that ties worker roles into the concept that 'Christ was a servant leader,' and emphasize[d] the importance in Christian tradition of serving others."[4]

Another large retailer, Forever 21, is an international clothing company that was founded by a deeply religious Christian couple, Do Won Chang and Jin Sook, who do not attempt to conceal their religious beliefs. The Korean couple has defended printing

---

[3] http://www.becketfund.org/hhsinformationcentral/ (last visited October 15, 2013).

[4] http://news.harvard.edu/gazette/story/2009/11/god-and-walmart/ (last visited October 17, 2013).

John 3:16[5] on their shopping bags, with Chang stating on CNN, "I hoped others would learn of God's love, so that's why I put [the scripture on the bags]."[6]

Similar religious beliefs are at the roots of Hobby Lobby. Hobby Lobby, a leader in the arts and crafts industry, pronounces that their company is committed to "[h]onoring the Lord in all we do by operating the company in a manner consistent with biblical principles." The company further contends that "[w]e believe that it is by God's grace and provision that Hobby Lobby has endured. He has been faithful in the past, and we trust Him for our future."[7]

There are a number of publishing companies that work to foster their owners' religious beliefs, including the Wycliffe family of companies.[8] Harvest House Publishers proclaim through their mission statement, that their purpose is "[t]o glorify God by providing high-quality books and products that affirm biblical values..."[9] Another publisher who exercises religion through their work is Evangelical Christian Publishers Association. Their mission is to

---

[5] "For God so loved the world that he gave his only Son, so that everyone who believes in Him might not perish but might have eternal live.'

[6] http://www.washingtonpost.com/blogs/on-leadership/wp/2013/08/19/forever-21s-leaked-memo-faith-at-work/ (last visited October 17, 2013).

[7] http://www.hobbylobby.com/our_company/ (last visited October 17, 2013).

[8] http://www.wycliffe.org/About/WhatWeBelieve.aspx ("Our work in the Bible translation movement flows out of our identity as followers of Jesus."). (last visited October 17, 2013).

[9] http://harvesthousepublishers.com/history/ (last visited October 17, 2013).

equip their members with knowledge to make the Christian message more widely known.[10] Paulist Press is another large publishing company that has adhered to Catholic values since its inception over one hundred years ago. The Paulist Press is a major component of the work of the Paulist Fathers and traces its history back to 1881. It publishes books explaining the teachings of the Catholic faith. Paulist Press continues to spread the word of the gospel to Catholics and strives to foster religious values and wholeness in society.[11] Companies such as these publishers have practiced their religion and founded their business predicated on these principles.

Kregel, Inc., combines publishing with retail operations by combining three divisions within the corporation: Kregel Publications, Editorial Portavoz, and Kregel Parable Christian Bookstores. The company vision is to "maximize the impact of quality, life-changing Christian resources."[12]

A decision that the Religion Clause of the First Amendment does not apply to organizations would also affect LifeWay, which operates more than 160 Christian stores, manages a conference center, and

---

[10] http://www.ecpa.org/?page=about_ecpa (last visited October 15, 2013).

[11] http://www.paulistpress.com/Promotions/About-Us.aspx (last visited October 15, 2013).

[12] http://www.kregel.com/ME2/dirmod.asp?sid=A12DB34B70B34EA28EA748A96CD5AEFE&type=gen&mod=Core+Pages&gid=A615A3BFB3EA496C83F0F4CFDCBE387D (last visited October 15, 2013).

owns B&H Publishing Group, a publisher of study Bibles and other Christian books.[13]

Business owners that seek to practice their religion in the way they conduct their business are not limited to publishers of religious books. Chick-fil-A, is a for-profit national restaurant chain that has remained closed on Sundays since its inception more than sixty years ago. The founder of the hugely popular restaurant chain, Truett Cathy, has stated that the "practice of closing his restaurants on Sunday is unique to the restaurant business and a testament to his faith in God. ... [He] knew that he would not deal with money on the "Lord's Day." Today, the Closed-on Sunday policy is reflected in the company's Corporate Purpose: 'To glorify God by being a faithful steward of all that is entrusted to us.'"[14] Cathy believes that being closed on Sunday is critical and it states "two important things to people: One, that there must be something special about the way Chick-fil-A people view their spiritual life and, two, that there must be something special about how Chick-fil-A feels about its people."[15]

Religious people operate businesses throughout the nation. They bring their religious values with them to the business operation because they believe there is no way to separate the two. These businesses include Interstate Batteries, which declares its mission statement as a company founded: "to glorify

---

[13] http://www.lifeway.com/Article/About-Us (last visited October 15, 2013).

[14] http://www.chick-fila.com/Pressroom/Fact-Sheets/sunday_2012 (last visited October 15, 2013).

[15] *Id.*

God as we supply our customers worldwide..."[16] ServiceMaster - the company that owns Merry Maids, Terminix, and others - was founded by former minor league baseball player, Marion E. Wade. Wade wished to incorporate his "strong personal faith and desire to honor God in[to] all he did."[17] Tom's of Maine, founded by Tom Campbell, is a company known for its naturally produced toothpaste. Campbell graduated from Harvard Divinity School, and is an active Episcopalian. While at Harvard Divinity School, a professor suggested to Campbell that he run his business based on his faith, treating it like a ministry. Campbell did just that, and the company continues to thrive under his vision.[18]

This is but a small sampling. Companies large and small throughout the nation are operated as an extension of their owners' religious beliefs. These owners believe that they cannot be one thing on the day they worship and something else the rest of the week. Instead, for them, their religion is a calling to live their lives and conduct their businesses according to the rules of their faith. The decision below and the argument put forward by the United States seeks to strip these business owners of their religious liberty.

---

[16] http://corporate.interstatebatteries.com/mission/ (last visited October 15, 2013).

[17] http://servicemaster.com/about-us/history (last visited October 15, 2013).

[18] http://www.businessinsider.com/17-big-companies-that-are-intensely-religious-2012-1?op=1 (last visited October 15, 2013).

II. Religion, As Understood By The Founders And This Court's Decisions, Is A Communal Activity Affecting The Way Citizens Conduct Their Lives

The lower court's decision, and the position pressed by the United States, proposes a new constitutional test holding that individuals lose their religious liberty when they operate a "secular, for-profit" company. The qualifiers defeat the proposition under this Court's current precedents. The recognition that some corporations and groups are entitled to the First Amendment right of Free Exercise of religion defeats any argument that petitioners' family-owned corporation is not entitled to Free Exercise rights. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978). This Court has long recognized that organizations, including corporations, engaged in religious activity are protected by the First Amendment. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993); *see Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694, 706 (2012).

This Court has not limited this recognition to purely religious operations. *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 579-580 (1983). The position adopted by the government today means that the hospital run by the Roman Catholic Church in *Bradfield v. Roberts*, 175 U.S. 291, 297-99 (1899), was not pursuing a religious mission protected by the First Amendment. It would mean that the Society of Sisters of the Holy Names of Jesus & Mary

were not pursuing a religious mission protected by the First Amendment in the operation of their school which included "[s]ystematic religious instruction and moral training according to the tenets of the Roman Catholic Church." *Pierce v. Society of Sisters*, 268 U.S. 510, 531-32 (1925). This is a radical proposition requiring review by this Court.

This Court has looked to the "historic function" of a particular constitutional liberty to determine whether it was "purely personal" or could be exercised by a corporation. *See Bellotti*, 435 U.S., at 778 n.14. Even if one dismisses the statement in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 365 (2012), that this "Court has recognized that First Amendment protection extends to corporations," the issue of whether religion was a purely personal liberty seems to have been laid to rest in *Roberts v. Jaycees*, 458 U.S. 609 (1984). There, this Court noted that an individual's right to worship could not be protected from state interference without the freedom to engage in group efforts. *Id.*, at 622.

Although the court below quoted the "historic function" formulation, it did not actually look at any history. That history shows that religion has always been understood to be a communal, rather than a purely individual, activity. Further, the exercise of religion was never thought to be limited to what happens inside a house of worship. Instead, the Founders understood religion as shaping the citizen's way of life. This understanding continues today and is evidenced in companies like Conestoga Wood Specialties and organizations of business executives promoting religious values in their companies' activities.

The communal nature of the Christian Religion is shown first in its texts. In the Gospel of Matthew, Jesus is reported saying "For where two or three are gathered in my name, I am there among them." Matthew ch.18, v. 20, THE NEW OXFORD STUDY BIBLE at New Testament 35 (Michael D. Coogan, ed.) (Oxford 2007). It should be no surprise then that the Founders encouraged group prayer and action as a means of both protest and thanksgiving.

Mercy Otis Warren reports that the colonies generally observed prayer and fasting on June 1, 1774 in protest of the Boston Port Bill. Mercy Otis Warren, 1 HISTORY OF THE RISE, PROGRESS, AND TERMINATION OF THE AMERICAN REVOLUTION at 133 (1808) (Liberty Fund 1988). President Washington proclaimed November 26, 1789 as a day of "public thanksgiving and prayer." W.B. Allen, GEORGE WASHINGTON, A COLLECTION at 534-35 (Liberty Classics 1988). In that same year, Congress authorized the appointment of paid chaplains so that it could open its session with prayer. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). This continued the practice of the Continental Congress to open each session with prayer. *Id.*, 787.

As this Court has noted "We are a religious people." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The Founders understood this and relied on it in the design of government. During the ratification debates, there was concern over the ban on religious tests in Article VI. Religion (and the Christian Religion in particular), in the view of the objectors, was best "calculated ... to make good members of society." Caldwell, Debate in North Carolina Ratifying Convention, July 30, 1788, reprinted in 5 THE FOUNDERS'

CONSTITUTION at 92 (Phillip B. Kurland and Ralph Lerner, eds. 1987). Thus, elements of the practice of religion were built in to the Constitution – specifically the requirement of an Oath. As James Iredell argued, an oath is a "solemn appeal to the Supreme Being, for the truth of what is said, by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments." *Id.*, at 91.

This understanding of the nature of an oath was applied in legal proceedings, with courts reminding witnesses of their religious duty to tell the truth. *See In re Williams*, 29 F. Cas. 1334, 1340 (E.D. Penn. 1839). The view was that the crime of perjury standing alone was not sufficient. The law required a belief by the witness that a violation of the oath would be punished by a Supreme Being. *United States v. Kennedy*, 26 F. Cas. 761 (D. Ill. 1843). Exemptions from the oath were only granted if the individual's religion prohibited oaths. *See In re Bryan's Case*, 1 Cranch C.C. 151; 4 F. Cas. 506 (D.C. Cir. 1804).

Because citizens were expected to exercise their religion in their civic life, religious belief was important to the citizen's qualification to sit on a jury. In *Reason v. Bridges*, 1 Cranch C.C. 477; 20 F. Cas. 370 (D.C. Cir. 1807), the court was called on to decide whether a party challenging a juror could examine them on the religious doctrine of their faith or must present separate proof of that doctrine.

Other evidence that the Founders understood that exercise of religion took place outside houses of worship is found in state constitutions of the time. Maryland's Constitution of 1776 guaranteed religious liberty "to all people professing the Christian religion" and provided that no person should be mo-

lested "by law" in their belief or religious practice so long as they did not breach the peace, injure others, or violate laws of morality. Francis Newton Thorpe, 3 THE FEDERAL AND STATE CONSTITUTIONS at 1689 (Hein 1993). The New York Constitution of 1777 granted "liberty of conscience, but specified that this freedom was not to be construed to "excuse of acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." *Id.*, vol. 5 at 2637. Massachusetts' 1780 Constitution had similar provisions. *Id.*, vol. 3 at 1889.

These constitutions show that the founding generation understood that religion is practiced in public as part of our daily life. The early state constitutions were willing to protect those practices so long as they did not result in a breach of the peace.

This idea that religion is practiced in the way we conduct our lives, including the way we run our businesses, is not just a quaint notion from a bygone era. The family behind Conestoga Wood Specialties is not alone in its belief that their religion should inform their way of life. In addition to the many companies owned and operated by people with similar motivations, business executives gather to encourage each other to live their faith.

A broad-based organization of this type is The High Calling, an organization that provides resources for "[h]onoring God in our daily work."[19] The organization publishes articles and provides resources for implementing religion in our work life. CEO's and other top executives of the Catholic faith

---

[19] http://www.thehighcalling.org/about (last visited October 17, 2013).

can participate in Legatus, an organization that seeks to help executives "To study, live and spread the Catholic faith in our business, professional and personal lives."[20]

Another example is found in interfaith prayer breakfasts where business leaders will share how they implement their religious values in the way they manage their company.[21] A national prayer breakfast has been held since members of Congress invited President Eisenhower to join them for the event in 1953.[22] Since that time, Presidents have annually attended the event and spoke about how their faith informs the way they carry out the duties of their office.[23]

People of faith do not leave their religion at the worship-house door. As the Founders understood, they live their religion in their daily civic life including in the manner in which they run their business. Historical practice demonstrates that the First Amendment's protection of religious liberty was not intended to be confined to individual activities inside a house of worship. It was meant to protect individuals and groups in all aspects of their daily lives.

---

[20] http://www.legatus.org/mission (last visited October 17, 2013).

[21] *E.g.*, http://www.atlantarotary.org/2012-atlanta-interfaith-business-prayer-breakfast (Atlanta 2012 prayer breakfast) (last visited October 17, 2013).

[22] http://thefellowshipfoundation.org/activities.html (last visited October 17, 2013).

[23] *E.g.*, http://www.whitehouse.gov/the-press-office/2013/02/07/remarks-president-national-prayer-breakfast (Remarks of President Obama) (last visited October 17, 2013).

Although this Court may not reach the underlying substance of the claim raised by Conestoga, the importance of that issue and its impact on people of faith is an important consideration that counsels in favor of granting review in this case. The requirement at issue compels religious people to finance and facilitate the termination of life. That this is something absolutely forbidden by many faiths is of no moment to the United States.

Of special concern in this context is the discretion vested in the Executive Branch to determine who is bound by this mandate. The Affordable Care Act vests virtually unfettered discretion in an administrative agency to choose what requirements to impose and which employers will be required to obey the requirements. *See* The Center for Consumer Information and Insurance Oversight, *Annual Limits Policy: Protecting Consumers, Maintaining Options, and Building a Bridge to 2014* (identifying 1,231 employers, employing more than two million employees, who have received exemptions from the Act's employer mandate and other requirements of the Act).[24]

This discretion is even more troubling when it is employed in a manner that abridges religious liberty. This Court has previously warned of the threat to First Amendment rights that comes from such unfettered discretion. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 56, 61-64 (1999) (holding unconstitutional an anti-loitering ordinance because the "absolute discretion" it gave to police might "authorize and even encourage arbitrary and discriminatory en-

---

[24] Available at http://www.cms.gov/CCIIO/Resources/Files/ approved_applications_for_waiver.html (last visited October 8, 2013).

forcement"). The exercise of discretion to exempt some, but not all, objectors from this requirement poses a significant risk of anti-religious targeting. This is a legitimate concern. Just as the United States argued that the Religion Clause did not protect Hosanna-Tabor Church in the selection of its ministers, (*Hosanna-Tabor*, 132 S.Ct., at 706 (EEOC arguing that religious organizations could only rely on implied freedom of association, rather than the Religion Clause, to defend against government interference with selection of ministers) it argues in this case that a family loses its religious liberty when it forms a closely held, family-owned corporation.

The mandate at issue in this case - that the "essential minimum coverage" required by the Act include abortion services, contraceptives, and abortifacient drugs – is one that is in direct violation of the sincerely held religious beliefs of millions of Americans. Strikingly, it is not imposed by the Act itself but rather by implementing regulations. *Compare* 42 U.S.C. § 300gg–13(a)(4) (mandating coverage, without cost-sharing by plan participants or beneficiaries, of "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration"), *with* 77 Fed.Reg. 8725, 8725 (Feb. 15, 2012) (recommending regulations later adopted by HHS that the guidelines require coverage for "[a]ll Food and Drug Administration [FDA] approved contraceptive methods [and] sterilization procedures . . . for all women with reproductive capacity"). This Court has declined to examine legislation to determine whether the discretion granted to the executive is so broad as to be a surrender of legislative power. *See Whitman v. American Trucking Associations*, 531 U.S. 457, 474

(2001) (noting that this Court had found the requisite 'intelligible principle' lacking only in two cases, one in which the statute provided literally no guidance, and the other that allowed regulation of the entire economy by the imprecise standard of fair competition). The Court should review, however, whether Congress intended this level of interference with religious liberty. *See Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."). This is the case where such review is appropriate.

CONCLUSION

The issue in this case affects thousands of business owners across the nation. At issue is whether individuals and families must surrender their constitutionally guaranteed religious liberties when they form a business. Nothing in the history or purpose of the First Amendment supports such a rule. Indeed, the Founders understood religion to be a communal activity that would be exercised in every aspect of citizens' daily lives.

Certiorari should be granted in this case to review whether Americans religious liberties are restricted to individual activities inside the walls of a house of worship. Certiorari should also be granted to review whether Congress intended the agency in this case to impose regulations that trench on deeply held religious beliefs of millions of Americans.

DATED: October, 2013.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave., NE
Washington, D.C.
20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law at Chapman Univ.
One University Drive
Orange, CA 92866
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence